

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN CLERKIN and VERONICA MENDEZ,  
individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

MYLIFE.COM, INC.; JEFFREY TINSLEY;  
RACHEL GLASER; W. DWIGHT GORALL;  
ARMEN AVEDISSIAN; MICHAEL SOH; SHARYN  
ELES; and OAK INVESTMENT PARTNERS,

Defendants.

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No. C 11-00527 CW

ORDER GRANTING  
DEFENDANT  
GORALL'S RULE  
12(B)(2) MOTION  
TO DISMISS,  
GRANTING IN PART  
AND DENYING IN  
PART DEFENDANTS'  
RULE 12(B)(6)  
MOTION TO DISMISS  
AND GRANTING IN  
PART PLAINTIFFS'  
MOTION TO APPOINT  
INTERIM CLASS  
COUNSEL  
(Docket Nos. 39,  
42 and 47)

Defendant W. Dwight Gorall moves to dismiss Plaintiffs John Clerkkin and Veronica Mendez's claims against him for lack of personal jurisdiction. Gorall and Defendants MyLife.com, Inc.; Jeffrey Tinsley; Rachel Glaser; Armen Avedissian; Michael Soh; Sharyn Eles; and Oak Investment Partners move to dismiss Plaintiffs' action for failure to state a claim. Plaintiffs oppose these motions and move to appoint their counsel as interim class counsel. Non-parties Cynthia McCrary and Cody Brock oppose Plaintiffs' motion. The motions were heard on June 9, 2011. Having considered oral argument and the papers submitted by the parties, the Court GRANTS Gorall's Rule 12(b)(2) motion to dismiss, GRANTS in part Defendants' Rule 12(b)(6) motion to dismiss and DENIES it in part and GRANTS in part Plaintiffs' motion to appoint

1 their counsel as interim class counsel.

2 BACKGROUND

3 The following allegations are contained in Plaintiffs'  
4 complaint.

5 MyLife.com, Inc., operates mylife.com, an Internet website.  
6 MyLife presents those who sign up for its service with "a list of  
7 fake names of people supposedly 'searching for you.'" Compl. ¶ 1.  
8 To show that the website-generated lists are false, Plaintiffs  
9 point to a testimonial posted on the Internet by an individual who  
10 registered on the website as "sfsf sdgfsdgs." Id. at 3:4. The  
11 website then returned a result, indicating that seven people were  
12 looking for "sfsf sdgfsdgs." Id. Plaintiffs cite another  
13 individual's Internet testimonial stating that, irrespective of the  
14 zip code entered, the website indicated that "Grovia Paxton" was  
15 residing in that zip code area and was looking for the individual.  
16 Id. at 3:11-17.

17 In mid-2010, Clerkin began receiving emails from MyLife,  
18 stating that people were searching for him on the website. On or  
19 about September 25, 2010, Clerkin signed up for MyLife "at \$21.95  
20 for one month." Compl. ¶ 7. After using the website, Clerkin  
21 realized "that no one he knew was looking for him." Id. He then  
22 discovered that he had been charged \$155.40. Clerkin requested a  
23 full refund. However, MyLife refunded only \$104.55 and kept the  
24 balance.

25 In early 2010, Mendez received an email from MyLife stating  
26 that someone was searching for her. Like Clerkin, she subsequently  
27 discovered "that no one she knew was actually searching for her."

1 Compl. ¶ 8. Mendez signed up for a \$5.00 "trial subscription," but  
2 was charged \$60.00. Id. When she canceled the service and  
3 requested a refund, MyLife refused to return any money.

4 The individual Defendants hold the following positions:  
5 Tinsley is MyLife's founder, chairperson and chief executive  
6 officer; Glaser is MyLife's chief operating and financial officer;  
7 Gorall, a Florida resident, is MyLife's Vice President of Emerging  
8 Business; Avedissian is a MyLife employee who develops business  
9 strategies; Soh is MyLife's Senior Vice President for Marketing;  
10 and Eles is MyLife's Vice President of Marketing Operations.  
11 Glaser, Gorall, Avedissian, Soh and Eles "conspired with MyLife,  
12 Mr. Tinsley, and others to perpetrate" the alleged fraudulent  
13 scheme. Compl. ¶¶ 11-15.

14 Oak Investment Partners, a venture capital firm, provided \$25  
15 million to MyLife. It, too, "conspired with MyLife, Mr. Tinsley,  
16 and others to perpetrate" the alleged fraudulent scheme. Compl.  
17 ¶ 16.

18 Plaintiffs bring the following claims against Defendants:  
19 (1) common count for money had and received; (2) violation of  
20 California's Consumer Legal Remedies Act (CLRA), Cal. Civ. Code  
21 §§ 1750, et seq.; (3) violation of the fraud prong of California's  
22 Unfair Competition Law (UCL), Cal. Bus. & Prof. Code §§ 17200, et  
23 seq.; (4) violation of the UCL's unlawful prong; (5) violation of  
24 the UCL's unfair prong; and (6) unjust enrichment and common law  
25 restitution.

26 Plaintiffs contend that the individual Defendants and Oak  
27 Investment Partners should be held liable for MyLife's conduct  
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1 because "each of them personally performed acts" giving rise to the  
2 first through fifth causes of action. Compl. ¶¶ 33, 47, 63, 76 and  
3 89. Plaintiffs also argue that each Defendant aided and abetted  
4 and conspired with MyLife and the other Defendants, and furnished  
5 the means to accomplish the alleged misconduct, all of which also  
6 supports liability against them. Plaintiffs seek respondeat  
7 superior liability against Tinsley, Glaser and Gorall for  
8 Avedissian's, Soh's and Eles's conduct. Finally, Plaintiffs  
9 contend that Tinsley and Glaser can be held personally liable for  
10 the conduct of MyLife and other Defendants based on an agency  
11 theory.

#### 12 DISCUSSION

##### 13 I. Gorall's Rule 12(b)(2) Motion to Dismiss

14 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a  
15 defendant may move to dismiss for lack of personal jurisdiction.  
16 The plaintiff then bears the burden of demonstrating that the court  
17 has jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374  
18 F.3d 797, 800 (9th Cir. 2004). The plaintiff "need only  
19 demonstrate facts that if true would support jurisdiction over the  
20 defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).  
21 Uncontroverted allegations in the complaint must be taken as true.  
22 AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.  
23 1996). However, the court may not assume the truth of such  
24 allegations if they are contradicted by affidavit. Data Disc, Inc.  
25 v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir.  
26 1977). If the plaintiff also submits admissible evidence,  
27 conflicts in the evidence must be resolved in the plaintiff's

1 favor. AT&T, 94 F.3d at 588.

2 There are two independent limitations on a court's power to  
3 exercise personal jurisdiction over a non-resident defendant: the  
4 applicable state personal jurisdiction rule and constitutional  
5 principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361  
6 (9th Cir. 1990); Data Disc, Inc., 557 F.2d at 1286. California's  
7 jurisdictional statute is co-extensive with federal due process  
8 requirements; therefore, jurisdictional inquiries under state law  
9 and federal due process standards merge into one analysis. Rano v.  
10 Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

11 The exercise of jurisdiction over a non-resident defendant  
12 violates the protections created by the due process clause unless  
13 the defendant has "minimum contacts" with the forum state so that  
14 the exercise of jurisdiction "does not offend traditional notions  
15 of fair play and substantial justice." Int'l Shoe Co. v.  
16 Washington, 326 U.S. 310, 316 (1945).

17 A. General Jurisdiction

18 General jurisdiction exists when a defendant maintains  
19 "continuous and systematic" contacts with the forum state even if  
20 the cause of action has no relation to those contacts.  
21 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408,  
22 414 (1984). The standard for establishing general jurisdiction is  
23 "fairly high." Id. Random, fortuitous or attenuated contacts do  
24 not count in the minimum contacts calculus. Burger King v.  
25 Rudzewicz, 471 U.S. 462, 475 (1985). Factors considered in  
26 evaluating the extent of contacts include whether the defendant  
27 makes sales, solicits or engages in business, designates an agent  
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1 for service of process, holds a license, or is incorporated in the  
2 forum state. Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223  
3 F.3d 1082, 1086 (9th Cir. 2000).

4 Plaintiffs plead only that Gorall has aided and abetted  
5 MyLife's alleged misconduct and worked with other Defendants to  
6 perpetrate the alleged fraud. They do not allege any particular  
7 action taken by Gorall. Plaintiffs' unadorned allegations, which  
8 offer no factual background, are not sufficient to support general  
9 jurisdiction over Gorall.

10 B. Specific Jurisdiction

11 A court has specific jurisdiction over a defendant when the  
12 cause of action arises out of or relates to the defendant's  
13 activities within the forum. Data Disc, Inc., 557 F.2d at 1286.  
14 The "minimum contacts" required to assert specific jurisdiction are  
15 analyzed using a three-prong test: (1) the non-resident defendant  
16 must purposefully direct its activities towards, or consummate some  
17 transaction with, the forum or a resident thereof, or perform some  
18 act by which it purposefully avails itself of the privilege of  
19 conducting activities in the forum, thereby invoking the benefits  
20 and protections of its laws; (2) the claim must be one which arises  
21 out of or results from the defendant's forum-related activities;  
22 and (3) the exercise of jurisdiction must be reasonable. Lake v.  
23 Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). Each of these  
24 conditions is required for asserting jurisdiction. Ins. Co. of N.  
25 Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

26 Plaintiffs argue that Gorall purposefully directed his  
27  
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1 activities toward California residents.<sup>1</sup> For a defendant's conduct  
2 to demonstrate purposeful direction, the defendant must "allegedly  
3 have (1) committed an intentional act, (2) expressly aimed at the  
4 forum state, (3) causing harm that the defendant knows is likely to  
5 be suffered in the forum state." Schwarzenegger, 374 F.3d at 802  
6 (quoting Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th  
7 Cir. 2002)).

8 As noted above, Plaintiffs make only broad, general  
9 allegations against Gorall. Without more, the fiduciary shield  
10 doctrine applies to him. Under this doctrine, "a person's mere  
11 association with a corporation that causes injury in the forum  
12 state is not sufficient in itself to permit that forum to assert  
13 jurisdiction over the person." Davis v. Metro Prods., Inc., 885  
14 F.2d 515, 520 (9th Cir. 1989). The doctrine is subject to two  
15 exceptions: "(1) where the corporation is the agent or alter ego of  
16 the individual defendant; or (2) by virtue of the individual's  
17 control of, and direct participation in the alleged activities."  
18 Wolf Designs, Inc. v. DHR & Co., 322 F. Supp. 2d 1065, 1072 (C.D.  
19 Cal. 2004) (citations omitted). Plaintiffs do not allege that  
20 MyLife is the alter ego of Gorall, and their averments do not  
21 afford any insight into how Gorall controlled or directly  
22 participated in the alleged fraudulent scheme. Plaintiffs'

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23  
24 <sup>1</sup> In a heading, Plaintiffs contend that Gorall purposefully  
25 availed himself of the privilege of conducting activities in  
26 California. However, the purposeful availment analysis generally  
27 pertains to contract claims. See Schwarzenegger, 374 F.3d at 802  
28 ("A purposeful availment analysis is most often used in suits  
sounding in contract. A purposeful direction analysis, on the  
other hand, is most often used in suits sounding in tort.").  
Plaintiffs have not alleged that Gorall entered into a contract.

1 pleadings do not support specific jurisdiction over Gorall.

2 Accordingly, Plaintiffs' claims against Gorall are dismissed  
3 without leave to amend for lack of personal jurisdiction. Although  
4 Plaintiffs seek to conduct jurisdictional discovery, they do not  
5 justify their request and it is denied. See Butcher's Union Local  
6 No. 498, United Food & Commercial Workers v. SDC Inv., Inc., 788  
7 F.2d 535, 540 (9th Cir. 1986) (concluding that plaintiffs' belief  
8 that discovery will reveal additional contacts is not sufficient to  
9 justify granting jurisdictional discovery). If, in the course of  
10 otherwise permissible discovery in this case, Plaintiffs learn of  
11 information that would support specific personal jurisdiction over  
12 Gorall, they may promptly move for leave to amend to add him as a  
13 Defendant.

14 II. Defendants' Rule 12(b)(6) Motion to Dismiss

15 A complaint must contain a "short and plain statement of the  
16 claim showing that the pleader is entitled to relief." Fed. R.  
17 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
18 claim is appropriate only when the complaint does not give the  
19 defendant fair notice of a legally cognizable claim and the grounds  
20 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
21 (2007). In considering whether the complaint is sufficient to  
22 state a claim, the court will take all material allegations as true  
23 and construe them in the light most favorable to the plaintiff. NL  
24 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

25 However, this principle is inapplicable to legal conclusions;  
26 "threadbare recitals of the elements of a cause of action,  
27 supported by mere conclusory statements," are not taken as true.



1 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly,  
2 550 U.S. at 555).

3 When granting a motion to dismiss, the court is generally  
4 required to grant the plaintiff leave to amend, even if no request  
5 to amend the pleading was made, unless amendment would be futile.  
6 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
7 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment  
8 would be futile, the court examines whether the complaint could be  
9 amended to cure the defect requiring dismissal "without  
10 contradicting any of the allegations of [the] original complaint."  
11 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).  
12 Leave to amend should be liberally granted, but an amended  
13 complaint cannot allege facts inconsistent with the challenged  
14 pleading. Id. at 296-97.

15 A. Plaintiffs' Claims Against the Individual Defendants and  
16 Oak Investment Partners

17 Plaintiffs base their claims against the individual Defendants  
18 and Oak Investment Partners on allegations that these Defendants  
19 performed acts that facilitated MyLife's alleged misconduct,  
20 conspired with each other to advance the challenged scheme and  
21 "furnished the means" to accomplish any alleged wrongdoing.  
22 Further, Plaintiffs seek to hold Tinsley, Glaser and Gorall on  
23 respondeat superior grounds, asserting that they authorized and  
24 directed their subordinates to engage in misconduct.

25 These general allegations are not sufficient to state claims  
26 against the individual Defendants or Oak Investment Partners.  
27 Plaintiffs' complaint does not explain what these Defendants did to  
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1 participate in the alleged scheme. For instance, although  
2 Plaintiffs allege that these Defendants personally performed acts,  
3 they do not identify any particular conduct.<sup>2</sup> A complaint is not  
4 sufficient "if it tenders 'naked assertion[s]' devoid of 'further  
5 factual enhancement.'" 129 S. Ct. at 1949 (quoting Twombly, 550  
6 U.S. at 557).

7 Accordingly, Plaintiffs' claims against the individual  
8 Defendants and Oak Investment Partners are dismissed. Plaintiffs  
9 are granted leave to amend to allege the acts each Defendant  
10 performed to advance the alleged fraudulent scheme.

11 B. Plaintiffs' CLRA Claim Against MyLife

12 The CLRA imposes liability for "unfair methods of competition  
13 and unfair or deceptive acts or practices undertaken by any person  
14 in a transaction intended to result or which results in the sale or  
15 lease of goods or services to any consumer." Cal. Civ. Code  
16 § 1770(a).

17 Plaintiffs acknowledge that their CLRA claim is based on fraud  
18 and that they must satisfy the heightened pleading requirements of  
19 Federal Rule of Civil Procedure 9. "In all averments of fraud or  
20 mistake, the circumstances constituting fraud or mistake shall be  
21 stated with particularity." Fed. R. Civ. Proc. 9(b). The  
22 allegations must be "specific enough to give defendants notice of  
23 the particular misconduct which is alleged to constitute the fraud  
24 charged so that they can defend against the charge and not just  
25 deny that they have done anything wrong." Semegen v. Weidner, 780

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27 <sup>2</sup> Indeed, it is not clear how Oak Investment Partners, an  
28 entity, could "personally perform" an action.

1 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and  
2 nature of the alleged fraudulent activities are sufficient, id. at  
3 735, provided the plaintiff sets forth "what is false or misleading  
4 about a statement, and why it is false." In re GlenFed, Inc.,  
5 Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). Scierter may be  
6 averred generally, simply by saying that it existed. Id. at 1547;  
7 see Fed. R. Civ. Proc. 9(b) ("Malice, intent, knowledge, and other  
8 condition of mind of a person may be averred generally.").

9 Plaintiffs contend that their CLRA claim has two bases:

10 (1) MyLife's representations in its email solicitations to  
11 Plaintiffs that "someone" was looking for them and (2) MyLife's  
12 billing practices. The Court considers each in turn.

13 1. Email Solicitations

14 The gravamen of Plaintiffs' complaint about MyLife's email  
15 solicitations is that the emails represented that someone was  
16 searching for Plaintiffs, even though no one was. Plaintiffs  
17 purportedly received such emails in early to mid-2010. They plead  
18 that the website produces "a list of fake names" for those who sign  
19 up. As noted above, Plaintiffs cite several testimonials posted on  
20 the Internet recounting tests of the mylife.com website suggesting  
21 that these names are fake.

22 Plaintiffs' allegations, which must be taken as true, satisfy  
23 their pleading burden under Rule 9 and, if proved, could show that  
24 MyLife violated the CLRA.<sup>3</sup> Their allegations suggest that MyLife's

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25  
26 <sup>3</sup> Specifically, MyLife's alleged actions could be found to  
27 fall within the following categories of conduct proscribed the  
28 CLRA,

1 statement that people were looking for them was false or deceptive.  
 2 Defendants argue that Plaintiffs' inability to recognize the names  
 3 of the people looking for them does not demonstrate that its emails  
 4 were false or deceptive. This is beside the point. Plaintiffs  
 5 plead that the names of the people purportedly looking for them are  
 6 fictitious and they allege a sufficient factual basis to support  
 7 this assertion.

8 Defendants contend that Plaintiffs have failed to plead any  
 9 damage based on the alleged misrepresentations. This is incorrect.  
 10 Plaintiffs allege that, based on MyLife's refusal to offer a full  
 11 refund, Clerkin effectively paid \$50.85. MyLife declined to refund  
 12 any portion of the \$60.00 Mendez paid. These alleged amounts  
 13 reflect Plaintiffs' damages. Defendants contend that Plaintiffs do  
 14 not plead that they did not receive value from their use of the  
 15 site. This argument is also unavailing. Plaintiffs aver that the  
 16 website presented lists of fake names and provided information "of  
 17 no conceivable value to anyone." Compl. ¶ 1. This suggests that  
 18 they did not receive value from their subscriptions.

19 Accordingly, Defendants' motion to dismiss Plaintiffs' CLRA  
 20 claim against MyLife, to the extent it is based on the email  
 21 solicitations, must be denied.

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22 (3) Misrepresenting the affiliation, connection, or  
 23 association with . . . another. . . .

24 (5) Representing that . . . services have . . . uses  
 25 [and] benefits . . . which they do not have . . . .

26 (9) Advertising . . . services with intent not to sell  
 27 them as advertised.

28 Cal. Civ. Code § 1770.

2. Billing Practices

Plaintiffs contend that MyLife's billing practices violated the CLRA. They allege that Clerkin signed up for services "at \$21.95 for one month" but was billed \$155.40. Compl. ¶ 7. They also allege that Mendez signed up for a "trial subscription . . . for \$5.00" but was charged \$60.00. Id. ¶ 8. Viewed in the light most favorable to Plaintiffs, these allegations state a CLRA claim. The averments suggest that, based on MyLife's representations, Plaintiffs signed up for a particular subscription, but that MyLife billed for another.

Accordingly, Plaintiffs' CLRA claim against MyLife will not be dismissed in any respect.

C. Plaintiffs' UCL Claims Against MyLife

California's UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of almost any federal, state or local law may serve as the basis for a UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798, 827 (2003).

To assert standing under the UCL, plaintiffs must allege that they "suffered an injury in fact" and "lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

1 The purpose of section 17204 is to "eliminate standing for those  
2 who have not engaged in any business dealings with would-be  
3 defendants." Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 317  
4 (2011).

5 Plaintiffs' allegations support standing under the UCL. They  
6 plead facts suggesting that MyLife deceived them through its email  
7 solicitations and representations about its billing practices and  
8 that they lost money as a result. Further, Plaintiffs' allegations  
9 supporting their CLRA claim against MyLife likewise support their  
10 claims against MyLife under the UCL's unlawful and fraudulent  
11 prongs. Below, the Court considers whether Plaintiffs have stated  
12 their claim against MyLife under the UCL's unfair prong.

13 In Cel-Tech Communications, Inc. v. Los Angeles Cellular  
14 Telephone Company, 20 Cal. 4th 163 (1999), the California Supreme  
15 Court enunciated the elements of a UCL claim brought by competitors  
16 under the UCL's unfair prong. Since then, California courts of  
17 appeal have reached varying conclusions as to the elements  
18 consumers must plead and prove to prevail under the UCL's unfair  
19 prong. See, e.g., Lozano v. AT&T Wireless Servs., Inc., 504 F.3d  
20 718, 735-736 (9th Cir. 2007); Drum v. San Fernando Valley Bar  
21 Ass'n, 182 Cal. App. 4th 247, 256 (2010). Three tests have been  
22 used. Drum, 182 Cal. App. 4th at 256. Under one test, a consumer  
23 must allege a "violation or incipient violation of any statutory or  
24 regulatory provision, or any significant harm to competition." Id.  
25 Under the second test, a consumer is required to plead that a  
26 defendant's conduct "is immoral, unethical, oppressive,  
27 unscrupulous or substantially injurious to consumers" and  
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1 demonstrate how "the utility of the defendant's conduct" is not  
2 outweighed by "the gravity of the harm to the alleged victim." Id.  
3 (citation and internal quotation marks omitted). The third test,  
4 which is based on the Federal Trade Commission's definition of  
5 unfair business practices, requires that "(1) the consumer injury  
6 must be substantial; (2) the injury must not be outweighed by any  
7 countervailing benefits to consumers or competition; and (3) it  
8 must be an injury that consumers themselves could not reasonably  
9 have avoided." Id. at 257 (citation and internal quotation marks  
10 omitted).

11 Under any of these tests, Plaintiffs allege sufficient facts  
12 to support their claim against MyLife under the UCL's unfair prong.  
13 Defendants do not dispute that, if Plaintiffs are able to state a  
14 CLRA claim, they satisfy the first test stated above. Plaintiffs'  
15 allegations also satisfy the second test because they have alleged  
16 misconduct without utility that outweighs injury to consumers.  
17 Finally, Plaintiffs allege facts indicating that they have lost  
18 money based on MyLife's alleged misconduct, that they did not  
19 benefit from this alleged misconduct and that, based on MyLife's  
20 purported deception, they could not reasonably have avoided the  
21 injury.

22 Accordingly, Plaintiffs' claims against MyLife under the  
23 unlawful, unfair and fraud prongs of the UCL are cognizable.

24 D. Plaintiffs' Claim Against MyLife for Money Had and  
25 Received

26 A claim under the common count for money had and received is  
27 stated if it is alleged that "the defendant is indebted to the  
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1 plaintiff in a certain sum for money had and received by the  
2 defendant for the use of the plaintiff." Schultz v. Harney, 27  
3 Cal. App. 4th 1611, 1623 (1994) (citation and internal quotation  
4 marks omitted). Defendants contend that this claim rests on the  
5 viability of Plaintiffs' other claims. Because Plaintiffs have  
6 stated CLRA and UCL claims based on MyLife's alleged email  
7 solicitations, their common count against MyLife for money had and  
8 received is cognizable.

9 E. Unjust Enrichment and Restitution

10 California courts appear to be split as to whether there is an  
11 independent cause of action for unjust enrichment. Baggett v.  
12 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)  
13 (applying California law). One view is that unjust enrichment is  
14 not a cause of action, or even a remedy, but rather a general  
15 principle, underlying various legal doctrines and remedies.  
16 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In  
17 McBride, the court construed a "purported" unjust enrichment claim  
18 as a cause of action seeking restitution. Id. There are at least  
19 two potential bases for a cause of action seeking restitution:  
20 (1) an alternative to breach of contract damages when the parties  
21 had a contract which was procured by fraud or is unenforceable for  
22 some reason; and (2) where the defendant obtained a benefit from  
23 the plaintiff by fraud, duress, conversion, or similar conduct and  
24 the plaintiff chooses not to sue in tort but to seek restitution on  
25 a quasi-contract theory. Id. at 388. In the latter case, the law  
26 implies a contract, or quasi-contract, without regard to the  
27 parties' intent, to avoid unjust enrichment. Id.



1 Another view is that a cause of action for unjust enrichment  
2 exists and its elements are receipt of a benefit and unjust  
3 retention of the benefit at the expense of another. Lectrodryer v.  
4 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide Sav.  
5 v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

6 Even under McBride's more stringent view, Plaintiffs state an  
7 unjust enrichment claim. As already explained, they have alleged  
8 adequately that MyLife obtained money from them based on deceptive  
9 email soliciations. Thus, Plaintiffs' unjust enrichment claim  
10 against MyLife is cognizable.

11 III. Plaintiffs' Motion to Appoint Their Counsel as Interim Lead  
12 Counsel

13 Federal Rule of Civil Procedure 23(g)(3) permits a court to  
14 "designate interim counsel to act on behalf of a putative class  
15 before determining whether to certify the action as a class  
16 action." Plaintiffs ask the Court to appoint their counsel, Bursor  
17 & Fisher P.A., as interim lead class counsel. As noted above,  
18 McCrary and Brock, who are not parties to this action, oppose  
19 Plaintiffs' motion. They ask the Court to deny Plaintiffs' motion  
20 as premature or, in the alternative, to appoint their counsel as  
21 interim co-lead class counsel. McCrary is the plaintiff in McCrary  
22 v. MyLife.com, Inc., Case No. C 11-2353 CW (N.D. Cal.), and Brock  
23 is the plaintiff in Brock v. MyLife.com, Inc., Case No. C 11-3073  
24 CW (N.D. Cal.).

25 Plaintiffs' action will go forward. Having considered the  
26 parties' submissions, the Court appoints Plaintiffs' counsel and  
27 McCrary and Brock's counsel as co-interim class counsel.  
28

## CONCLUSION

For the foregoing reasons, the Court GRANTS without prejudice Gorall's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction (Docket No. 39), GRANTS in part Defendants' Rule 12(b)(6) motion to dismiss and DENIES it in part (Docket No. 42) and GRANTS in part Plaintiffs' motion to appoint their counsel as interim class counsel (Docket No. 47). If, in the course of otherwise permissible discovery in this case, Plaintiffs learn of information that would support specific personal jurisdiction over Gorall, they may promptly move for leave to amend to add him as a Defendant. Plaintiffs' claims against the individual Defendants and Oak Investment Partners are dismissed for failure to state a claim. Plaintiffs are granted leave to amend to plead facts supporting personal liability against these Defendants. Defendants' Rule 12(b)(6) motion to dismiss is denied in all other respects.

This case, along with McCrory and Brock, shall proceed as a consolidated action. All future filings shall be filed in the 11-0527 case, the lowest numbered of the three lawsuits. The Clerk shall close the files on the 11-2353 and 11-3168 cases.

Defendants MyLife.com and Oak Investment Partners' motions concerning Plaintiffs' Consolidated Amended Class Action complaint are set to be heard on September 1, 2011 at 2:00 p.m.

IT IS SO ORDERED.

Dated: 8/15/2011



CLAUDIA WILKEN

United States District Judge